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3 IN THE UNITED STATES DISTRICT COURT  
4 FOR THE DISTRICT OF OREGON5 GARY D. FULLER, )  
6 Petitioner, ) Civ. No. 05-506-TC  
7 vs. )  
8 ) FINDINGS AND RECOMMENDATION  
9 )  
10 JEAN HILL, )  
11 Respondent. )  
12 \_\_\_\_\_)

13 Coffin, Magistrate Judge:

14 Petitioner petitions for a writ of habeas corpus on the  
15 basis of ineffective assistance of counsel. For the reasons that  
16 follow, the petition (#2) should be denied.

## 17 BACKGROUND

18 After a jury trial, petitioner was convicted of two counts  
19 of first-degree rape and first-degree sodomy, and three counts of  
20 first-degree sexual abuse, stemming from abuse of a disabled  
21 woman who lived in his home under the care of his wife. Resp.  
22 Ex. 101; 102. The complainant suffered from cerebral palsy and  
23 mental retardation. Resp. Ex. 104, Tr. 37, 197.24 Petitioner alleged a number of claims in his pro se petition  
25 but has elected to argue only one to the court.<sup>1</sup> Petitioner  
asserts that his trial counsel provided constitutionally26  
27 <sup>1</sup>In light of petitioner's failure to adduce evidence that would  
28 contravene the allegations in respondent's answer on the unbriefed  
claims, the court denies relief on those claims. See 28 U.S.C. § 2248.

1 ineffective assistance because he failed to ask the court to  
2 excuse an apparently inattentive juror.

3 The record discloses the following relevant facts. At the  
4 beginning of the second day of trial, outside the presence of the  
5 jurors, the court asked the attorneys: "And there was some  
6 discussion on the record yesterday also about a juror who had  
7 appeared to have some problems staying awake. I didn't know if  
8 there was any challenge to his remaining on the jury panel?" The  
9 transcript from the previous day does not include the discussion  
10 to which the judge referred, but the colloquy in response to the  
11 court's question provides further information:

12  
13 [Defense counsel]: I believe that he is  
14 fine, it was just a matter of being  
overworked and . . .

15 [Prosecutor]: Uh, yeah, obviously we  
16 have some concern, but I think he got  
some rest and . . .

17 THE COURT: . . . Alright that's fine.

18 [Defense counsel]: I'm not sure what we  
19 can do about it, it wouldn't be any  
point replacing him at this point, I  
don't think.

20 THE COURT: Alright, that's fine, I just  
21 wanted it on the record that there was  
no objection to his continuing.

22 Resp. Ex. 104, Tr. 149-50.

23 At the close of trial, the jury returned a verdict  
24 convicting petitioner on the offenses listed above but acquitted  
25 petitioner on a number of other rape and sexual abuse counts.

26 Resp. Ex. 104, Tr. 430. Petitioner filed a direct appeal,  
27 arguing in part that the trial court erred in permitting a juror  
28

1 to sleep during trial. Resp. Ex. 106. The Oregon Court of  
2 Appeals affirmed without opinion. Resp. Ex. 108. Petitioner  
3 elected not to seek review in the Oregon Supreme Court.

4 In his petition for post-conviction relief, petitioner  
5 asserted that his trial counsel was ineffective for failing to  
6 object to an inattentive juror. Resp. Ex. 109. In his post-  
7 conviction deposition, petitioner testified that his trial  
8 counsel alerted him to a juror who fell asleep for five or ten  
9 minutes. Resp. Ex. 113, Tr. at 27. For his part, petitioner's  
10 trial counsel averred, "I do not have any recollection of a juror  
11 sleeping. If a one [sic] was sleeping, my usual policy would be  
12 to ask the judge to do something that would awaken the juror  
13 without causing embarrassment to the juror." Resp. Ex. 115 at 2.  
14 Petitioner testified at his post-conviction trial that he "didn't  
15 know if [the juror] was sleeping or just resting or whatever he  
16 was doing," and stated that he "never really watched [the juror]  
17 that much--that hard." Resp. Ex. 114, Tr. 14. Petitioner's  
18 deposition testimony states that he believed that the attorneys  
19 confronted the inattentive juror after meeting with the judge.  
20 Resp. Ex. 113, Tr. at 30. The post-conviction court denied any  
21 relief. Resp. Ex. 115, Tr. 1-2. The Court of Appeals affirmed,  
22 and the Oregon Supreme Court denied review. Resp. Ex. 118, 120.

23 Petitioner now requests this court to grant a writ of habeas  
24 corpus on the basis of ineffective assistance of counsel in  
25 violation of the Sixth Amendment. For the reasons that follow,  
26 the petition should be denied.

27 STANDARDS

28 Under the Anti-Terrorism and Effective Death Penalty Act of  
3 Findings and Recommendation

1 1996 (AEDPA), a federal court may not grant habeas relief  
 2 regarding any claim "adjudicated on the merits" in a state court  
 3 unless the state court ruling "was contrary to, or involved an  
 4 unreasonable application of, clearly established Federal Law, as  
 5 determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). The  
 6 Supreme Court has explained that a state court decision is  
 7 "contrary to" federal law under the AEDPA if it either fails to  
 8 apply the correct Supreme Court authority or applies the correct  
 9 controlling authority to a case involving "materially  
 10 indistinguishable" facts but reaches a different result.  
 11 Williams v. Taylor, 529 U.S. 362, 405-07, 413 (2000). Similarly,  
 12 a state court decision is an unreasonable application of federal  
 13 law "if the state court identifies the correct governing legal  
 14 principle from [the Supreme] Court's decisions but unreasonably  
 15 applies that principle to the facts of the prisoner's case."  
 16 Lockyer v. Andrade, 538 U.S. 63, 75 (2003) (citations omitted).

17 "In Williams and in subsequent decisions the Supreme Court  
 18 has repeatedly emphasized that 'an unreasonable application of  
 19 federal law is different from an incorrect application of federal  
 20 law.'" Clark v. Murphy, 331 F.3d 1062, 1067 (9th Cir. 2003)  
 21 (quoting Williams, 529 U.S. at 410). Thus, "[t]he petitioner  
 22 must demonstrate not only that the state court's application of  
 23 governing federal law was erroneous, but also that it was  
 24 objectively unreasonable." Ramirez v. Castro, 365 F.3d 755, 762  
 25 (2004) (citing Andrade, 538 U.S. at 75); see also Penry v.  
 26 Johnson, 532 U.S. 782, 793 (2001); Clark, 331 F.3d at 1068-69  
 27 (discussing Andrade and the appropriate standard of review).

28 In ineffective assistance of counsel cases, the federal law

1 in question is the Strickland standard, which states that a  
2 defendant alleging a Sixth Amendment violation must demonstrate  
3 "a reasonable probability that, but for counsel's unprofessional  
4 errors, the result of the proceeding would have been different."  
5 Strickland v. Washington, 466 U.S. 668, 694 (1984). Thus, the  
6 task of the habeas court is to consider whether the post-  
7 conviction court implemented an unreasonable application of  
8 Strickland when it determined that petitioner was not denied  
9 effective assistance of counsel.

10 Petitioner bears the burden of proving, by a preponderance  
11 of the evidence, the underlying facts supporting the ineffective  
12 assistance of counsel claim. See ORS 138.620(2). Moreover, 28  
13 U.S.C. § 2254(d) creates a presumption that state court findings  
14 of fact, after a hearing on the merits, are correct.

#### 15 ANALYSIS

16 Petitioner contends that defense counsel provided  
17 constitutionally inadequate representation by failing to ask  
18 the court to excuse a juror who was apparently inattentive  
19 during a short time on the first day of trial. In order to  
20 demonstrate that he was deprived of a fair trial, petitioner  
21 was required to show that the juror's inattention deprived him  
22 of due process; in other words, he must show that the juror  
23 slept during a critical part of the trial. See United States  
24 v. Springfield, 829 F.2d 860, 864 (9th Cir. 1987) (no  
25 deprivation of fair process when juror slept during  
26 inconsequential portions of trial). Petitioner did not do so.

27 Though petitioner stated in deposition testimony that the  
28 juror in question slept for five or ten minutes on the first

1 day of trial, Resp. Ex. 113, Tr. 27, he later testified at  
2 trial that he saw the juror close his eyes for a "couple  
3 minutes" and could not tell whether the juror "was sleeping or  
4 just resting" because he "never really watched [the juror] that  
5 much--that hard." Resp. Ex. 113, Tr. 14. As noted above,  
6 trial counsel did not recall observing that the juror was  
7 asleep. When the court considered the matter with counsel, the  
8 attorneys described the juror as overworked and under-rested.  
9 Neither the court nor the attorneys characterized the juror as  
10 having fallen asleep. The post-conviction court likewise  
11 rejected petitioner's characterization, concluding that his  
12 claim "with regard to . . . a sleepy juror" was "not proven or  
13 persuasive." Resp. Ex. 115, 1-2.

14 In addition, petitioner puts forth no evidence that any  
15 inattentiveness occurred during a "critical phase" of the  
16 proceeding. Petitioner offers no affidavit of any juror or  
17 attorney present to describe the timing of the asserted sleep  
18 episode. The only evidence of such timing, if a juror indeed  
19 fell asleep, is petitioner's own post-conviction deposition,  
20 which he effectively disavowed by testifying at trial that he  
21 did not know whether the juror was sleeping.

22 Petitioner argues that the post-conviction court ignored  
23 the deposition testimony in which petitioner asserted that his  
24 trial attorney had alerted him to a juror who fell asleep for  
25 five or ten minutes, resulting in an unreasonable determination  
26 of the facts based on the evidence before the post-conviction  
27 court. Accordingly, petitioner argues, that determination  
28 warrants no deference. That argument is unavailing. The post-

1 conviction court was presented with trial counsel's statement  
2 that he did not recall that a juror fell asleep, the colloquy  
3 between the trial court and attorneys concerning a juror's  
4 inattentiveness, and petitioner's own post-conviction testimony  
5 that he did not pay close attention to the juror in question or  
6 know whether he was sleeping. In view of that evidence, the  
7 post-conviction court's conclusion that petitioner's  
8 ineffectiveness claim based on the inattentive juror was not  
9 "proven or persuasive" was not an unreasonable determination of  
10 the facts before that court.

11 Petitioner further contends that the post-conviction court  
12 employed an unreasonable application of the law in determining  
13 that defense counsel's failure to object to the inattentive  
14 juror did not qualify as ineffective assistance. Petitioner's  
15 argument rests on the following statement in the post-  
16 conviction judgement: "Petitioner's claims with regard to . .  
17 . a sleepy juror . . . were not proven or persuasive. The  
18 court concludes that petitioner has failed to show by a  
19 preponderance of the evidence that his trial counsel was  
20 inadequate." Resp. Ex. 115, 2. In petitioner's view, that  
21 statement provides dispositive evidence that the post-  
22 conviction court did not conduct a Strickland analysis, which  
23 requires an evaluation of whether trial counsel's error fell  
24 below the standards of professional conduct, and if so, whether  
25 there is a reasonable probability that the error affected the  
26 outcome of the trial.

27 The statement does not require that conclusion. The  
28 correct standard was articulated in both parties' arguments to

1 the post-conviction court. Resp. Ex. 110 at 4, Resp. Ex 114,  
2 Tr. 26. In the paragraphs leading up to the challenged  
3 statement in the post-conviction judgment, the post-conviction  
4 court evaluated facts underlying certain of petitioner's other  
5 ineffectiveness claims. It then turned to the remaining claims  
6 in a summary fashion. In both of the sentences that sum up the  
7 judgment, the post-conviction court elided the description of  
8 its evaluation of the factual issue, e.g., whether petitioner  
9 proved the facts underlying his claim by a preponderance of the  
10 evidence as required by ORS 138.620(2), with the secondary  
11 inquiry, a mixed question of law and fact, concerning whether  
12 there was a reasonable probability that the error affected the  
13 outcome of the trial as required by Strickland. Thus, in  
14 concluding that petitioner's claims were not "proven" or  
15 "persuasive," the court necessarily determined that the  
16 underlying facts were not proved, and thus the claim failed.  
17 Petitioner has not provided any evidence that the court engaged  
18 in an improper inquiry, aside from its construal of the post-  
19 conviction court's own shorthand summation.

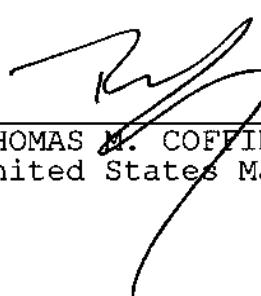
20 Petitioner further argues that this court should exercise  
21 de novo review of the record in light of the challenged  
22 statement in the post-conviction judgment. Even if de novo  
23 review were appropriate, this court's findings and  
24 recommendation would remain the same: petitioner has not  
25 adduced evidence in the record other than his self-contradicted  
26 post-conviction deposition testimony that the juror in question  
27 fell asleep, much less that the juror slept during a critical  
28 phase of the proceeding. Thus, petitioner has failed to

1 demonstrate that the post-conviction court erred in dismissing  
2 petitioner's ineffective assistance claim.

3 CONCLUSION

4 Petitioner's petition for writ of habeas corpus (#2)  
5 should be denied, and this case should be dismissed. This  
6 recommendation is not an order that is immediately appealable  
7 to the Ninth Circuit Court of Appeals. Any notice of appeal  
8 pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure,  
9 should not be filed until entry of the district court's  
10 judgment or appealable order. The parties shall have ten days  
11 from the date of service of a copy of this recommendation  
12 within which to file specific written objections. Failure to  
13 timely file objections to any factual determinations of the  
14 Magistrate Judge will be considered a waiver of a party's right  
15 to de novo consideration of the factual issue and will  
16 constitute a waiver of a party's right to appellate review of  
17 the findings of fact in an order or judgment entered pursuant  
18 to the Magistrate Judge's recommendation.

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20 Dated this 21 day of July, 2007.

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24 THOMAS M. COFFIN  
25 United States Magistrate Judge  
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